

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

\* \* \* \* \* CIVIL ACTION  
ARTUR ANDRADE, ET AL \* 18-00385-WES  
\*  
VS. \* JULY 22, 2019  
\*  
OCWEN LOAN SERVICING, LLC, \* PROVIDENCE, RI  
ET AL \*  
\* \* \* \* \*

HEARD BEFORE THE HONORABLE LINCOLN D. ALMOND  
MAGISTRATE JUDGE

(Defendants' Motion to Dismiss and Plaintiff's Motion  
to Amend)

**APPEARANCES:**

FOR THE PLAINTIFF: TODD S. DION, ESQ.  
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FOR THE DEFENDANTS: SAMUEL C. BODURTHA, ESQ.  
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1  
2 THE COURT: We are on the record in the matter  
3 of Andrade versus Ocwen Loan Servicing, 18-385, and  
4 before the Court today for argument on Defendants'  
5 motion to dismiss, ECF filing No. 7, and the motion to  
6 amend filed by Plaintiff, ECF filing 13.

7 Will the attorneys present for this hearing  
8 identify themselves for the record, please.

9 MR. DION: Good morning, your Honor. Attorney  
10 Todd Dion on behalf of the Plaintiff.

11 THE COURT: Good morning.

12 MR. BODURTHA: Good morning, your Honor. Sam  
13 Bodurtha on behalf of the Defendants.

14 THE COURT: Good morning.

15 So I've reviewed the briefing, and I think the  
16 most efficient way to handle the hearing is to hear  
17 first from Mr. Dion to sort of lay out for me why he  
18 believes an amendment is warranted here, and why he  
19 thinks the amended complaint states viable claims.

20 Mr. Bodurtha, you can then respond to that.  
21 I'll let you reply and we'll see where that takes us.

22 MR. BODURTHA: Okay. Thank you.

23 MR. DION: Thank you.

24 Your Honor, one of the most basic tenets or  
25 foundations of recent foreclosure law in Rhode Island

1 is best described in the Bucci case, where it was  
2 explained by the Rhode Island Supreme Court that the  
3 power to invoke the statutory power of sale derives  
4 from the words of the mortgage contract and compliance  
5 with those terms.

6 The words of the mortgage contract in this case  
7 clearly and plainly state that the lender may invoke  
8 the statutory power of sale, quote, "subject to  
9 applicable law."

10 The mortgage states and reiterated that  
11 applicable law must be complied with, and I would argue  
12 must be strictly complied with in order to invoke  
13 statutory power of sale.

14 THE COURT: So that's your Count II in I guess  
15 the original and the proposed Amended Complaint, right?

16 MR. DION: Yes, your Honor. The main argument  
17 is based on the breach of contract claim, the Count II  
18 claim. That's really where the meat of this case is.

19 THE COURT: So let me ask you just a practical  
20 question. So I noted I believe it was in your reply  
21 brief where you made the same basic point where you  
22 said -- I'm trying to find the particular page.

23 You described the proposed Amended Complaint as  
24 a straight-forward state law contract theory alleging  
25 that the Defendants failed to foreclose in the manner

1       prescribed by applicable law, et cetera.

2               So my question would be why do you even need  
3       Count I? So as I read Count I, you're proposing to  
4       amend Count I to seek a declaratory judgment and that  
5       certain laws weren't followed and that, therefore, the  
6       foreclosure was void, which I think takes the  
7       declaratory judgment sort of one step beyond what it  
8       should be, right? You're asking for more affirmative  
9       relief.

10              But Count II would necessarily require the Court  
11       to undertake a determination, since it's based on the  
12       requirement that you say is in the contract to comply  
13       with applicable law, it would require the Court to  
14       determine what's applicable law and whether it was  
15       followed, right?

16              MR. DION: Yes, your Honor. That's correct.  
17       And in fact, now that I have reviewed what I had filed  
18       and I would even concede as to Count I and just proceed  
19       on Count II. I'm really looking for breach of contract  
20       claims here in this case.

21              THE COURT: All right. That makes more sense to  
22       me, and I think that could focus our discussion in  
23       today. I think it is somewhat duplicative.

24              Continue then. Why does Count II as set  
25       forth -- I mean, I understand the rules of amendment

1 and we should be liberal in granting amendments to  
2 parties in cases, but also we have the discretion to  
3 deny amendment where a claim doesn't state a viable  
4 cause of action.

5 So tell me a little bit more about Count II.

6 MR. DION: Your Honor, as to the contract claim,  
7 the Rhode Island state cases following Bucci as well as  
8 cases from this Court and the Rhode Island Bankruptcy  
9 Court have recognized that the foreclosure process and  
10 the statutory power of sale in Rhode Island is itself  
11 advantageous to the banks because the power of sale  
12 gives them the power to take property without judicial  
13 oversight; therefore, the terms of the mortgage  
14 document must be strictly complied with in order to  
15 foreclose.

16 This concept was recognized by Bankruptcy Judge  
17 Finkle in the Demers decision and by this Court in  
18 Judge McConnell's Martins decision, and I believe most  
19 similarly to this case in the Dan-Harry decision by  
20 Magistrate Sullivan and Chief Judge Smith.

21 These cases recognize that the terms of the  
22 mortgage especially when related to foreclosure are  
23 condition precedents to foreclosure.

24 And I would argue that it certainly is a  
25 condition precedent to foreclose in this case for the

1 lender or mortgagee servicer to comply with applicable  
2 state law related to the licensing of servicers in  
3 Rhode Island, and that statute is particularly  
4 mentioning illegal foreclosures as a prohibited act for  
5 unlicensed servicers under the statute.

6 Now, the Defendants, of course, are trying to  
7 make a similar argument as the defendants made in the  
8 Dan-Harry case that the plaintiffs are trying to  
9 enforce a regulation through the back door, but that is  
10 not the case here because the claims stem from the  
11 contract itself as Bucci and Dan-Harry explain and the  
12 clear and plain requirement that the Defendants comply  
13 with applicable law in order to foreclose.

14 THE COURT: So what I got out of Mr. Bodurtha's  
15 submissions, and he can correct me when he gets up if  
16 I'm misreading them, is he points to this consent order  
17 and says, Well, everything was resolved and there is no  
18 violation of state law, there was authority to conduct  
19 the foreclosures at the relevant time.

20 MR. DION: The law was enacted -- I believe that  
21 argument is forgetting about the fact that the law was  
22 enacted in 2014. So we have approximately two years  
23 where the Defendant was conducting foreclosures and  
24 collecting payments without a license in violation of  
25 the statute, which I'd also like to mention provides

1 for criminal penalties, I believe.

2 So the cease-and-desist order and the subsequent  
3 consent order that superseded it, I believe that  
4 focusing on those orders does not take away from the  
5 fact that Ocwen was in violation of the Rhode Island  
6 statute well before the cease-and-desist order came  
7 into existence, but that was with the proposed Amended  
8 Complaint reflects to expand the pool of plaintiffs  
9 since the law prohibiting unlicensed servicers from  
10 conducting foreclosures was enacted in 2014.

11 The Defendants made no effort to comply with the  
12 applicable law and become licensed until the  
13 cease-and-desist order, had been, in fact, conducting  
14 foreclosures without a license --

15 THE COURT: Just so the record is clear, I think  
16 I got from your pleadings and doing preparation for  
17 this hearing that the statute was effective July 1st,  
18 2015?

19 MR. DION: Yes, yes, your Honor. I apologize.  
20 That is when an amendment defining third-party loan  
21 servicers was enacted. Yes. So it would be July 2015,  
22 not 2014.

23 THE COURT: I just want to make sure we're all  
24 on the same page. All right.

25 MR. DION: With regard to the consent order and

1 the Defendants' contention that it supersedes the cease  
2 and desist, there's nothing in the consent order that  
3 specifically says that the consent order was to nullify  
4 the cease and desist retroactively. And if the Court  
5 was inclined to think so, I believe that that should be  
6 construed as an ambiguity that should be argued at  
7 summary judgement rather than a motion to dismiss or  
8 motion to amend where the allegations in the Complaint  
9 are to be viewed in the light most favorable to the  
10 Plaintiff.

11 THE COURT: All right. Anything further, sir?

12 MR. DION: No, your Honor.

13 THE COURT: All right. Thank you.

14 Mr. Bodurtha.

15 MR. BODURTHA: Thank you, your Honor.

16 So I'm going to limit what we're discussing here  
17 to the contract claim. It's my understanding that  
18 we're not talking about a direct action under the  
19 statute or a request for a declaratory relief, the  
20 statute was violated.

21 THE COURT: That's my understanding.

22 MR. BODURTHA: In terms of the contract claim,  
23 Citizens for Preservation of Waterman Lake versus  
24 Davis, the 1980 Supreme Court of Rhode Island decision,  
25 in that case a group of citizens filed -- and the Town



1 of Gloucester filed a lawsuit against a developer,  
2 actually someone who was accused of dumping waste into  
3 the environment. And the question for the Supreme  
4 Court to consider was whether or not the Town of  
5 Gloucester and its citizenry actually had a right to  
6 enforce a wetlands act violation against this  
7 developer.

8 The problem with their claim was, similar to  
9 this case, the wetlands act did not allow for a private  
10 right of enforcement. Instead, the wetlands act  
11 violations were to be enforced by various public  
12 entities, none of which included (Unintelligible).

13 THE COURT: Are they seeking to enforce here?  
14 If I understand --

15 MR. BODURTHA: Well, let me just get to -- this  
16 is a long-winded way of getting to this contract  
17 action.

18 THE COURT: Okay.

19 MR. BODURTHA: So the town comes in and says,  
20 wait a second, we had a contract with Davis. And  
21 because of our contract with Davis and because under  
22 every contract there's an implication that you'll  
23 comply with existing law, the fact that they have  
24 violated the wetlands act, according to us, allows us  
25 to sue Davis for breach of contract. And the Rhode

1 Island Supreme Court said, no, you can't do that  
2 because that contract did not create that type of  
3 obligation.

4 There was no way that the Rhode Island Supreme  
5 Court could imply or infer or find an express provision  
6 within the agreement that would allow for the  
7 contracting parties to use that contract as an  
8 enforcement mechanism.

9 The Court says, "Nor is this a case in which an  
10 existing statute expressly creates a specific  
11 obligation between the contracting parties. In such a  
12 case, the statute is as much as part of the contract as  
13 if the statute had been actually written into the  
14 contract."

15 Now, compare that to the Dan-Harry contract.  
16 Okay?

17 THE COURT: I want to talk about this contract.

18 So what does this mortgage say you need to do  
19 lawfully or comply with the contract and foreclose.

20 MR. BODURTHA: So two things. Number one, in  
21 terms of whether a mortgagee must comply, strictly  
22 comply with pre-conditions as a pre-condition to  
23 foreclosure, Judge McConnell's decision in Martins  
24 versus FHFA, he zeroed in on the notices and the fact  
25 that notices were required in order for a mortgagee to

1       foreclose. And he looked at Hetco versus Blanchette  
2       and Demers and said, well, if you're going to foreclose  
3       under the power of sale and you have these notices that  
4       you have to issue, those notices must strictly comply  
5       with Paragraph 22 of the standard Fannie Mae Freddie  
6       Mac mortgage instrument.

7               THE COURT: Yep.

8               MR. BODURTHA: The Martins decision does not  
9       stand for the prospect of, Listen, the entire contract  
10      must be strictly complied or strictly conformed to. He  
11      didn't say you have to comply with every single piece  
12      of applicable law. He limited his decision to  
13      Paragraph 22.

14              So what I would argue to the Court today is when  
15      you're considering whether simply meeting applicable  
16      law is a strict compliance construct, it's not.

17              I'm not suggesting that my client did not comply  
18      with applicable law but I don't believe that a borrower  
19      can --

20              THE COURT: Then is that meaningless language in  
21      the contract?

22              So if you're saying there's strict compliance --  
23      there would just be compliance, right?

24              MR. BODURTHA: Correct. So as long as the  
25      mortgage loan servicer is complying with applicable

1 law, then there's no trouble in terms of the contract  
2 itself.

3 THE COURT: And he says you're not, and you say  
4 that this consent order essentially retroactively  
5 abated, I think was the term you used, any prior  
6 non-compliance.

7 MR. BODURTHA: Well, no. Before I'm even  
8 getting there I'm suggesting to the Court that the  
9 servicing statute and the servicing licensing statute,  
10 which is a creature of the DBR, enforced by the DBR and  
11 penalized by the DBR, cannot be applied as applicable  
12 law under the contract because if you consider the  
13 difference between the Citizens for Preservation case  
14 and the Dan-Harry case on the other side, you can't  
15 reach the conclusion that a borrower entered into a  
16 contract with a lender with the express or implied  
17 agreement that somehow this licensing statute would  
18 control the bargain for exchange.

19 If you contrast this case with Dan-Harry, the  
20 reason why Dan-Harry can't apply is it's a HUD  
21 mortgage. Right?

22 When you enter into a HUD mortgage, there are  
23 certain regulations and controls that you bargain for  
24 in that exchange. One of those is if and when you go  
25 into default, your mortgage holder has to have a

1 face-to-face meeting with you. The mortgage holder has  
2 to send you a letter. They have to set up a time.  
3 They actually have to go to your house, knock on the  
4 door and have a face-to-face meeting in order to ensure  
5 that there is some negotiation or at least a level of  
6 work-out option before the foreclosure goes forward.

7 Now, all of that is not in the mortgage, right?  
8 But there's a term in a HUD mortgage in Paragraph 9  
9 which says in order to complete whatever, whatever,  
10 whatever, you've got to comply with HUD regulations.

11 So when a borrower enters in a HUD mortgage and  
12 accesses that type of agreement, in doing so they  
13 receive those kind of additional contractual guarantees  
14 which Magistrate Sullivan viewed as implied terms of  
15 the mortgage agreement.

16 So that, yes, in a HUD face-to-face or a HUD  
17 regulation mortgage, that particular borrower has the  
18 rights to come into court and say breach of contract  
19 because HUD regulations are implied here.

20 The same analysis cannot apply to this  
21 particular cause of action.

22 THE COURT: So what does it mean in the mortgage  
23 where it talks about subject to applicable law and sold  
24 in a manner prescribed by applicable law? And is that  
25 meaningless language?

1 MR. BODURTHA: No. It means that everything  
2 that my client did prior to foreclosure. It means that  
3 they issued the correct notices. It means that they  
4 went to a statutory power of sale foreclosure. It  
5 means that they had a fair and reasonable sale. It  
6 means in terms of this jurisdiction because clearly the  
7 applicable law provision is the way of saying, wow,  
8 there are provisions within Rhode Island law that must  
9 control.

10 For example, Rhode Island has a mediation  
11 statute, right? In order to notice the sale, you have  
12 to give them the notice of the availability of  
13 mediation with Rhode Island Housing, right? And then  
14 you go to Rhode Island Housing and if they can work out  
15 a deal, they can. But if not, you get a certification  
16 from Rhode Island Housing that says that you can go  
17 forward and foreclose.

18 That would be an instance where applicable law  
19 would control, right?

20 So in addition to whatever you have to do in  
21 order to foreclose, you have to follow the applicable  
22 law.

23 Is the licensing statute applicable law? Not to  
24 the terms of this contract. It can't apply because it  
25 wasn't part of the bargained-for exchange and isn't

1 even a law that the borrower can access in order to  
2 say, well, this was violated.

3 But consider the fact that -- let's assume that  
4 it is applicable law, okay? So then we'd be going  
5 under a contract theory alone, right?

6 There would have to first be a breach. There  
7 would have to be some instant showing that the contract  
8 was breached or that applicable law was breached.

9 There's nothing in the record here that would  
10 point you to that fact because immediately after the  
11 cease-and-desist order, emergency order was issued,  
12 Ocwen filed suit against the DBR and asked a Superior  
13 Court judge to stay enforcement of this emergency  
14 order. That happens in April of 2017. Nothing else  
15 happens in the litigation, right, for five months.

16 In September of 2017, the DBR comes back, going  
17 to court, the case is voluntarily dismissed and a  
18 consent order is issued, right, which reinstates  
19 Ocwen's ability to service loans, vacates the prior  
20 order and everyone goes along their way.

21 Nothing is mentioned within that order in terms  
22 of voiding out a foreclosure or some other type of  
23 penalty, which in this situation only the DBR could  
24 issue.

25 THE COURT: But why would the consent order deal

1 with that if it's a matter of contract?

2 MR. BODURTHA: Because it's the province of the  
3 DBR to assess whether there's any kind of misuse of it  
4 or violation of the servicing statute. It is not for  
5 the average private citizen or borrower to do so.  
6 That's the way the statute is set up. That's the  
7 concern here, that saying, well, there's a violation of  
8 my contract because their servicing license was under  
9 question, that doesn't go to the bargained-for exchange  
10 in the terms of the contract. That goes towards the  
11 servicer's relationship with the State of Rhode Island.

12 THE COURT: Assume they had no license. Then if  
13 they had no license, they weren't legally authorized to  
14 administer the foreclosure so, therefore, they didn't  
15 do it in compliance with applicable law?

16 MR. BODURTHA: Right. They'd be subject to a  
17 civil fine, a thousand dollars.

18 THE COURT: But also, in Mr. Dion's view, they  
19 didn't comply with the subject to applicable law and in  
20 the manner prescribed by applicable law because they  
21 didn't have the appropriate license.

22 MR. BODURTHA: But how does applicable law apply  
23 to this foreclosure when the borrower can't enforce  
24 that applicable law? How can a law that we're all  
25 conceding here --



1 THE COURT: So what is applicable then?

2 MR. BODURTHA: Well, it would have to be  
3 something that the borrower could enforce, right? The  
4 borrower can't come in and try to use some other law  
5 out there that he or she doesn't have the right to  
6 enforce. How would that apply to this particular  
7 borrower?

8 If the borrower has no private right of action,  
9 no one's debating that here. The private right of  
10 action is out. The declaratory judgment there could be  
11 a private right of action is out. We are not debating  
12 whether this particular borrower can apply this law.  
13 If we're not debating whether this particular borrower  
14 can apply the law, then how can it be applicable law to  
15 the contract?

16 It would be one thing if you had the DBR  
17 involved in this case.

18 THE COURT: So who does it have to be applicable  
19 to? It would be applicable to the servicer.

20 MR. BODURTHA: The contracting parties. It  
21 would have to be applicable to the contracting parties.  
22 You couldn't -- for example, Mr. Dion knows these cases  
23 very well because he's in Massachusetts. You couldn't  
24 go to Massachusetts and say, Well, 35A applies here  
25 because it can't. It's out of that jurisdiction.

1           The same or similar analysis can be used here in  
2 saying, you know what, this servicing statute cannot  
3 apply.

4           Now, we took it one step further. There are  
5 provisions within the servicing statute, right,  
6 Mr. Dion listed them, are all the violations that may  
7 be under Title 19, whatever, whatever (Unintelligible).

8           THE COURT: I just passed by that.

9           MR. BODURTHA: Prohibited acts. 19-14.1-4,  
10 okay. There are 19 prohibited acts. Within those 19  
11 prohibited acts, you can go through those acts and  
12 figure out that there are separate laws, separate  
13 contractual terms, separate federal provisions that  
14 might be violated in the event that those are not  
15 followed, but you don't file a lawsuit under that  
16 prohibited acts and practices. You have a stand-alone  
17 right to do it.

18           The reason why I raise that is to suggest that  
19 this doesn't mean that a borrower in Rhode Island is  
20 without remedy for some of the prohibited acts that are  
21 within that law because they're duplicative of other  
22 statutes, whether it's RESPA or TILA or the state laws  
23 concerning foreclosure and mediation.

24           All of those laws benefit and apply to the  
25 borrowers, right?

1           But whether or not a mortgage loan holder is  
2           operating with a servicer under the licensing issued by  
3           the DBR can't apply to the borrower, because the  
4           borrower has no right to enforce that statute. That's  
5           why the contract claim fails.

6           In the instance of Dan-Harry, the borrower  
7           alleged that he never had the HUD face-to-face meeting.  
8           That had nothing to do with HUD. It had nothing to do  
9           with the state agency. It was a singular relationship  
10          between the borrower and his lender and his mortgage  
11          loan servicer. Did that face-to-face negotiation take  
12          place? And under those circumstances, Magistrate Judge  
13          Sullivan determined, well, you got to comply with that.  
14          That's applicable law to the relationship of the  
15          contract.

16          But there's nothing here that goes to that  
17          point. You can't actually get to the point of  
18          applicable law if one of the two parties to the  
19          contract can't even apply the law on their own. How  
20          can you have a contract cause of action, right, when  
21          you can't even access the statute on your own.

22          There's another way to look at it. Martins.  
23          Talk about Martins, talk about Bucci, right, strict  
24          compliance. All those guarantees. The guarantees  
25          under the contract, right? Those are in the contract.

1 Paragraph 22 of the standard Fannie Mae/Freddie Mac  
2 mortgage loan instrument provides that in order to  
3 proceed with a foreclosure, the foreclosing mortgagee  
4 shall give the following notices. You've got to let  
5 them know what the default is. Thirty days out to  
6 cure. If you don't cure, it's going to be accelerated,  
7 et cetera, et cetera, et cetera. Right?

8 Those are specific bargained-for terms of the  
9 contract. That is entirely different from when we're  
10 talking about whether a mortgage holder and their  
11 servicer are actually licensed; and if they're not  
12 licensed, would they be subject to a penalty by the  
13 state DBR.

14 Now, one further step to take. Let's assume you  
15 say, well, this is a contract. Then let's assume you  
16 say, okay, there's applicable law. Let's assume that  
17 you even say that the applicable law was breached.  
18 What are the damages? What is the damage from a  
19 mortgage loan servicer conducting an otherwise valid  
20 and enforceable foreclosure? There's no other  
21 allegation in here concerning the foreclosure. What is  
22 the damage of the servicer doing that without a  
23 license?

24 Certainly in the eyes of the DBR if he did it  
25 without the license they'd fine you a thousand dollars,

1 right? That would go to the state. But what's the  
2 damage to the borrower? It's not like the borrower  
3 wasn't going to be foreclosed otherwise. There's no  
4 challenge to the default. There's no other servicing  
5 violation or standing violation. There's not even a  
6 Paragraph 22 strict compliance claim here by the  
7 representative Plaintiff. Instead, it's just saying,  
8 well, this foreclosure is barred because you didn't  
9 comply with the servicing statute. You didn't have a  
10 license to service, right?

11 So maybe a borrower says, well, I lost my house.  
12 That's damage enough. Right? That's always sort of  
13 the classic one. Well, you conducted my foreclosure,  
14 you took my house and this should be void. But aren't  
15 they subject to foreclosure as it is? Shouldn't they  
16 have been foreclosed on in the first place? Is there  
17 any challenge to the fact that they were in default;  
18 they received a notice of default; they received a  
19 notice of sale and they went through foreclosure? No.

20 And the borrower, not this borrower or any other  
21 representative borrower in this case is not going to  
22 come to the court and say I wasn't in default. They  
23 wouldn't be part of the class. All they're going to  
24 suggest to the court in an allegation is, well, I was  
25 foreclosed at a time when they didn't have a servicing

1 license.

2 So then the question is how were you damaged? I  
3 was foreclosed on. Then the question is, well,  
4 wouldn't you have been foreclosed on, otherwise? Well,  
5 yeah, except they didn't have a servicing license.

6 So what was the particular damage that you  
7 suffered as a result of that servicing license? I lost  
8 my house.

9 That's it. In an instance where you otherwise  
10 in a fully valid regardless you lose your house  
11 foreclosure.

12 The last element to this case is this. The  
13 Department of Business Regulations issued this  
14 emergency cease-and-desist order in April of 2017.  
15 (Unintelligible) they went after Ocwen big time. And  
16 at the end of the day the Department of Business  
17 Regulation and Ocwen resolved their differences through  
18 a consent order avoiding litigation that allowed for  
19 Ocwen to proceed in servicing over 6,000 mortgages in  
20 the State of Rhode Island.

21 It is a dangerous step to take for the borrower  
22 and the Court to go into that negotiation to interpret  
23 what was meant, what was intended and to apply  
24 additional penalties like voiding on a foreclosure that  
25 weren't otherwise discussed as between state agency and

1 mortgage loan servicer. That's the point we're at  
2 right now.

3 What we're talking about right now is a forensic  
4 view of how that whole negotiation took place, what did  
5 they intend by the consent order. What did they mean  
6 by this paragraph? What did they mean by this  
7 paragraph?

8 I would suggest to the Court that it's not our  
9 province to get involved in that type of a negotiation  
10 or that type of review or that type of an  
11 interpretation. That's why the law is set up as an  
12 enforcement mechanism as between state and licensee and  
13 why the statute does not provide for a private right of  
14 action.

15 If the statute did provide for a private right  
16 of action, then we wouldn't be having this conversation  
17 because you could just sue on the statute. But the  
18 fact that it didn't presents a dangerous scenario where  
19 we start going in and deciding if there should be some  
20 kind of extra penalty or extra measure that needs to be  
21 taken in consideration of what the DBR had merely  
22 alleged, right? He could rely on that no court  
23 adjudicated whether that cease-and-desist order was  
24 proper.

25 If you look at Title 19 and how the

1       cease-and-desist orders operate, the party against whom  
2       the cease-and-desist order is made has three days to  
3       file a judicial challenge, which is exactly what Ocwen  
4       did. Nobody ever adjudicated whether there was truly a  
5       violation. Nobody ever adjudicated whether the  
6       servicing license should just disappear or be  
7       invalidated. That never happened.

8               Instead, the DBR and Ocwen were able to resolve  
9       their differences. They entered into a consent order.  
10      That should be the end of the servicing license  
11      discussion.

12             Thank you.

13             THE COURT: Okay. Thank you.

14             Mr. Dion, I'll give you a chance to respond,  
15      sir.

16             MR. DION: Yes, your Honor. The borrower here  
17      is not trying to enforce applicable laws. He's trying  
18      to enforce the contract.

19             Now, the penalty for a violation 19-14-26,  
20      penalty for violations under licensed activities, any  
21      person who violates or participates in violation of the  
22      applicable provisions of this Title shall be guilty of  
23      a misdemeanor and a thousand dollar fine. It's a crime  
24      to conduct unlicensed foreclosures in Rhode Island.  
25      And I do believe it would be part of the benefit of my



1 client's bargain that pursuant to the applicable law  
2 provision of the contract that the servicer initiating  
3 foreclosure activities is not doing so illegally and,  
4 in fact, criminal.

5 The Citizens versus Davis case, I believe the  
6 contract in that case was not specific enough. It was  
7 just a general provision that they comply with state  
8 law.

9 The law in this case is specifically related to  
10 foreclosure and the contract states that the  
11 foreclosure must be conducted subject to applicable  
12 law. I believe "subject to" are pretty strong words  
13 that it's subject to the applicable laws most  
14 definitely a statute in which the penalty is a  
15 misdemeanor.

16 As far as the Dan-Harry case, yes, that case  
17 focused on face-to-face meetings, but it was also a  
18 condition precedent that the lender comply with all the  
19 HUD regulations, not just the face-to-face meeting  
20 regulation.

21 The foreclosure here is the breach. That is  
22 where the breach is, when the foreclosure was  
23 conducted, and the relief that my clients are seeking  
24 is that the foreclosure be deemed void.

25 That's all I have.

1 THE COURT: Thank you.

2 So I'm going to take the matter under  
3 advisement, and I think the best way to tee this up for  
4 Judge Smith is to do so in a Report and Recommendation  
5 on the motion to amend, which would be just focused on  
6 the viability of the proposed Count II.

7 Again, I think it presents the same issue but  
8 rather than adjudicating the motion to dismiss 7, I  
9 think on a motion to amend we can apply the 12(b)(6)  
10 standard to a proposed count. So I'd rather deal with  
11 it in that context. That's my initial reaction and  
12 recommend that the motion to dismiss, ECF 7,  
13 essentially be deemed moot and the legal issue be dealt  
14 with in the context of ECF 13, but I will do so in the  
15 Report and Recommendation so both sides will have a  
16 right to object and seek de novo review from Judge  
17 Smith.

18 I am going to take the matter under advisement,  
19 and I'll prepare that Report and Recommendation as soon  
20 as possible.

21 Thank you for your well-prepared arguments on  
22 both sides today, gentlemen. It's good to see both of  
23 you.

24 MR. DION: Thank you, your Honor.

25 MR. BODURTHA: Thank you, your Honor. Good to

1       see you, as well.

2               THE COURT: Court will be in recess.

3               (Adjourned.)

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C E R T I F I C A T I O N

I, Anne M. Clayton, Approved Federal Court Transcriber, do hereby certify that the foregoing transcript is a correct transcript prepared to the best of my skill, knowledge and ability from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Anne M. Clayton

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Anne M. Clayton

August 21, 2019

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Date